IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Appeal No.1068 of 2005

Mamodoo Jallow
Aged about 36 years,
Christian Adult, Jambian National,
holding Jambian Passport no.181128,
residing at Abuko at Jambian
(presently lodged at Mubai Central
Prison, Mumbai) Appellant

Vs.

1. A.A.Salkar (I.O.)
Air Intelligence Unit,
Customs Sahar Airport,
Mumbai.

2. State of Maharashtra Respondents

Mr.Atul Sarpande for appellant.
Mr.Shailesh Kantharia for Union of India.
Mr.D.P.Adsule, APP for State.

CORAM: B.H.MARLAPALLE, J.

September 5, 2007.

ORAL JUDGMENT:

1. This appeal arises from the order of conviction and sentence passed under Section 8(c) read with Section 21(c) and under Section 23(c) read with Section 28 of the Narcotic Drugs and Pshychotropic Substances Act, 1985 (for short "the Act") by the learned Special Judge (NDPS), Greater Mumbai by his judgment and order dated 28/10/2005 in NDPS Special Case No.153 of 1998. He has been

sentenced to suffer RI for ten years and to pay a fine of Rs.1 lakh on each count and all the sentences are directed to run concurrently. The appeal was admitted and the appellant's plea for bail was rejected.

2. As per the prosecution case the appellant along with one Hasan Khalid and other unknown persons entered into criminal conspiracy at New Delhi and Mumbai to acquire, purchase, possess, transport and export narcotic drugs between 26/1/1998 and 31/1/1998 and in pursuance of the said conspiracy the accused acquired and was found in possession at Mumbai of 1195 grams of morphine which came to be recovered from 76 capsules purged by him at J.J. Hospital, Mumbai while he was admitted as indoor patient from 31/1/1998 to 2/2/1998 at different intervals. The capsules containing morphine were swallowed by the accused during his travel from Delhi to Mumbai for exporting drugs therein out of India by travelling by Ethiopian Airlines Flight No. ET 661 on 31/1/1998 on which day the accused came to be apprehended and arrested under suspicion. On 31/1/1998 the officers of the Air Intelligence Unit of Customs, Sahar Airport, Mumbai on suspicion had intercepted the

accused who was to travel to Addis Ababa by Ethiopian Airlines Fligt No.ET 661 on completion of his immigration and customs check and on being enquired whether he was carrying any narcotic drugs either on his person on in his body, the accused replied in the negative. However, suspecting him of concealing of drugs in the body cavity, he was off loaded from the flight and was brought before the Magistrate and on the application made by the Officers, permission was granted for obtaining radiological examination of the accused and thus he came to be admitted in J.J. hospital (Emergency Ward No.4) on 31/1/1998 after having complied with the provisions of Section 50 of the NDPS Act. The accused purged 13 capsules in the presence of panchas and the officers and after some time he purged 11 more capsules in the kidney tray provided to him in the hospital thus taking the total number of capsules to 24. One of the packets was opened and small quantity of powder was tested on the Field Testing Kit which tested positive for morphine and total weight of 24 capsules came to 370 gms. of powder. On 1/2/1998 the accused again purged 13 and 11 capsules in the similar manner and when they were opened and weighed, the weight of the powder came to 385 gms. On the same day at about 10.20 a.m. the

accused purged 23 more capsules and the weight of the brown coloured powder from these capsules came to 350 gms. On 2/2/1998 he expressed his desire to pass stools and, therefore, he was taken with the panchas who were informed that on the earlier occasions he had purged in all 71 capsules. Subsequently the accused purged five more capsules and the total weight of the powder came to be 80 gms. from these five capsules. Thus the total capsules recovered from the body cavity of the accused came to 76 capsules and the weight of the powder from these capsules came to be 1195 gms.

3. Three samples of 5 gms. each from the powder in the presence of the panchas were drawn and the remaining quantity of 1180 gms. was sealed. Out of the collected samples, one was forwarded for chemical analysis in the office of the Deputy Chief Chemist and the test report (Exh.47) confirmed the samples of morphine containing 6.8 per cent. One sample was forwarded to Central Revenue Control Laboratory, New Delhi and the test report (Exh. 41) indicated that the sample contained 38.5 per cent of Diacetyl morphine. On 30/4/1998 complaint came to be filed before the Special Court and the charges were framed

against the accused at Exhibit 2 and to establish these charges the prosecution examined in all 15 witnesses. The statement of the accused under Section 313 of Cr.P.C. was recorded at Exhibit 66.

4. On assessment of the oral and documentary evidence placed on record by the prosecution the Special Court held that the prosecution failed to prove that the accused along with Hasan Khalid and other unknown persons had conspired to acquire, purchase, possess, transport and export out of India the contraband morphine in contravention of the provisions of the Act during the period from 26/1/1998 to 31/1/1998. However, the Special Court held that the accused was found having in his possession on 31/1/1998, 1195 gms. of morphine concealed in 76 capsules while boarding Ethiopian Airlines Flight No. ET 661 from Mumbai to Adis Ababa and that the recovered quantity of morphine from 76 capsules was out of the capsules purged by the accused while he was admitted in the J.J. hospital as in-door patient from 31/1/1998 to 2/2/1998 which capsules were concealed by the accused in his body cavity for exporting it out of India and thus he had attempted to export 1195 gms. of morphine by

travelling on the Ethiopian Airlines Flight No. ET 661 on 31/1/1998.

5. The trial Court held that the mandatory conditions of Sections 42 and 50 of the Act were complied with and that having regards to the percentage of morphine i.e. 38.5 per cent as per the report at Exhibit 41, the morphine recovered fell in the category of "commercial quantity". Mr.Sarpande, the learned counsel for the appellant at the threshold submitted that the accused was taken in custody on 31/1/1998 and from that date onwards he is continuously in custody as at present. He has thus suffered already a sentence of nine years and seven months out of the total sentence of 10 years and he also pointed out that the fine amount of Rs.2 lakhs in total could not be deposited by him as the financial conditions of the accused do not permit him to do so. Consequently the accused will have to suffer additional sentence of RI for six months and thus making a total sentence of ten years and six months. The accused will, therefore, be required to be in jail for another eleven months. Under these circumstances, Mr.Sarpande prayed for the accused being released on the basis of the sentence already

undergone and thus bringing the period of sentence within the purview of Sections 21(b) and 23(b) of the Act. The justification for this relaxation is as follows.

6. As noted earlier, three samples were taken and the trial Court considered the testimony of PW 8 - Imtiyaz Peshiman, Superintendent of Customs, Mumbai as well as PW 11 - Umeshwar Lal Sinha, who in the mean while had retired as Assistant Chemical Analyser. Through the depositions of PW 8 the test report at Exhibit 41 along with the covering letter at Exhibit 39 and receipt of CRCL at Exhibit 40 were brought on record. The test report at Exhibit 41 indicated that the sample tested positive for Diacetyl morphine having 38.5 per cent of drug. Similarly through the evidence of PW 11, the test report at Exhibit 47 was taken on record and this was in respect of the sample received by PW 11 on 4/2/1998 in sealed condition. The sample was analysed on 25/3/1998 and it tested positive for morphine having actual percentage of 6.8 per cent. The first report at Exhibit 41 was by CRCL, New Delhi and the second test report at Exhibit 47 was by the Asst. Chemical Analyser in the office of the Dy.

Chief Chemist, Customs Office, Bellard Pier, Mumbai. The learned Judge of the Special Court accepted both these reports and it would be relevant to reproduce the reasoning set out by him for accepting the report at Exhibit 47 as follows :

> "...Considering the evidence as above together with the documents, it can safely be said that the sample drawn on 3/2/98 in the office of A.I.U. from the powder recovered from all the 76 capsules purged by accused during the period from 31/1/98 to 2/2/98 in J.J. Hospital, contained Morphine having percentage to the extent of 6.8 per cent. Evidence of P.W. 11 goes unchallenged as defence has opted not to cross-examine this witness and has declined cross-examination."

Similar reasoning has been set out for accepting the report at Exhibit 41.

. On the point of percentage of morphine, Mr. Sarpande relied on the decision of the Division Bench of this Court in Confirmation Case No.6 of 2002 delivered on 26th October, 2004.

7. There is no dispute that as per the test report at Exhibit 41, the quantity of morphine will be in excess of 250 gms. and thus a "commercial quantity" whereas if the report at Exhibit 47 is taken into consideration the quantity of morphine would be certainly less than 250 gms.(81.5 gms.) and thus falling out of the purview of "commercial quantity". If the quantity of morphine recovered is less than 250 gms., in the instant case Section 21(b) and 23(b) will be attracted for awarding sentence whereas if the quantity is accepted to be a "commercial quantity", obviously for the purpose of sentence, Sections 21(c) and 23(c) of the Act will be attracted. Mr.Sarpande, therefore, urged, that if the trial Court accepted both the reports at Exhibit 41 and Exhibit 47, it was necessary to set out the reasoning as to why the Special Court accepted the quantity to be a "commercial quantity" and did not accept the same as the quantity which was not a commercial quantity. He further submitted that by following the principle in criminology, the accused must get the benefit of doubt. The sentence period under Sections 21(b) and 23(b) is upto ten years whereas the same under Sections 21(c) and 23(c) is

minimum ten years and it cannot be less than ten years. It is under these circumstances, Mr.Sarpande prayed for the release of the appellant - accused forthwith on the basis of the sentence he has already undergone.

8. I have heard Mr.Kantharia, the learned Standing Counsel for the Union of India and the reasoning set out by the trial Court clearly indicated that both the reports were accepted i.e. Exhibit 41 and Exhibit 47. He urged that the order of conviction has been rightly passed, having regards to the evidence, both oral and documentary that was placed before the Special Court. As noted earlier, the learned counsel for the appellant - accused has given up challenge to the order of conviction in the peculiar facts and circumstances of the case and he confined his arguments only on the point of sentence. However, unwittingly the submissions of Mr.Sarpande amount to bringing the order of sentence within the purview of Section 21(b) instead of Section 21(c) and Section 23(b) instead of Section 23(c) of the Act. There is no reason made out by the prosecution to deny to the accused the benefit of the test report at Exhibit 47. At the same time the trial Court also

did not take any steps to resolve the controversy between two different reports at Exhibit 41 and Exhibit 47. Under the circumstances, I do not have any hesitations to give the benefit of the test report at Exhibit 47 to the appellant - accused having regards more particularly to the fact that he has already suffered sentence of nine years and seven months.

9. In the premises, the appeal succeeds partly. The order of conviction passed by the learned Special Judge (NDPS), Greater Mumbai in NDPS Special Case No.153 of 1998 for the offence punishable under Section 8(c) is hereby confirmed. However, the order of sentence passed under Section 21(c) of the Act is hereby altered and the accused is sentenced under Section 21(b) to suffer RI for a period of nine years and to pay a fine of Rs.1 lakh in default to suffer further RI for three months. The order of conviction under Section 23 read with Section 28 of the NDPS Act is hereby confirmed. However, he is sentenced under Section 23(b) to suffer RI for nine years and to pay a fine of Rs.1 lakh in default to suffer further RI for three months. The substantive sentences are directed to run concurrently. Undoubtedly the

benefit of Section 428 of Cr.P.C. will be available to him. As the appellant has already suffered the sentence of more than nine years and six months, the appellant shall be released forthwith without depositing the fine amount.

. After pronouncement of the order, the learned Counsel for the petitioner prayed for continuation of the interim relief granted earlier by this Court as the petitioner proposes to approach the Apex Court. The learned Counsel for the respondents - workmen has opposed this application.

. However, I deem it appropriate that some time is granted to the petitioner and, therefore, the interim relief granted earlier to continue for a period of six weeks more.

(B.H.MARL

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